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52p

No. 96-1287

FILED
SEP 20 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA; BART L. GRAHAM, AS COMMISSIONER OF REVENUE OF THE STATE OF GEORGIA; RUSSELL W. HINTON, AS STATE AUDITOR OF THE STATE OF GEORGIA; AND GENA L. ABRAHAM, AS DIRECTOR OF THE GEORGIA STATE PROPERTIES COMMISSION,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether a railroad, in an action under 49 U.S.C. § 11501(b)(1) claiming that the State has overvalued its transportation property for tax purposes, is limited to disputing the way in which the State has applied a reasonable valuation methodology or may challenge the methodology itself by asking that true market value be recalculated under a different methodology.

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STATEMENT OF THE CASE

I. Nature Of The Litigation And Question Presented

Petitioner CSX Transportation, Inc. ("CSXT"), an interstate common carrier by rail, filed the instant action in September 2002 against the Georgia State Board of Equalization and its individual members, including the State Revenue Commissioner,[1] challenging the State's proposed assessment of the railroad's operating property for 2002 ad valorem tax purposes under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("the 4-R Act"), currently codified at 49 U.S.C. § 11501.[2] CSXT contended that the State's proposed assessment violated Section 11501(b)(1), which prohibits

> assess[ing] rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment

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[1] For simplicity purposes, the Respondents will hereinafter be referred to collectively as "the State."

[2] The language of the original § 306, first codified at 49 U.S.C. § 26c (1976 ed.), was slightly revised when the provision was recodified in 1978 (49 U.S.C. § 11503) and then again in 1995 (49 U.S.C. § 11501). The revisions were not intended to make a substantive change in the law. *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987) (1978 revision "may not be construed as making a substantive change in the laws replaced"); H.R. Conf. Rep. No. 104-422, at 878 (1995) ("This provision [Section 11501] replaces without substantive change former section 11503.") For convenience, further citations to the statute refer to the text of its current version in 49 U.S.C. § 11501 ("Section 11501").

> jurisdiction has to the true market value of the other commercial and industrial property.

CSXT argued that the State had significantly overvalued its transportation property, resulting in a ratio of assessed value to true market value for that property of approximately 55%, while other commercial and industrial property was assessed at only 40% of its value. Jt. App. 11, 12.

In *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) ("*Oklahoma Tax*"), this Court held that Section 11501 permitted review by federal courts of alleged overvaluation of railroad properties by state tax authorities. But the Court expressly left open the legal question presented here. Oklahoma's tax officials had derived the railroad's value by taking a weighted average of original cost and capitalized net operating income. *Oklahoma Tax*, 481 U.S. at 459. Although it ruled for the railroad, the Court noted that:

> Petitioner has not challenged the valuation *methodology* employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the *application of that methodology*, particularly the State's evaluation of the cost of capital and the State's refusal to make deductions for property which petitioner claims is obsolete. Tr. Of Oral Arg. 15-16. This case therefore does not present the question of whether a railroad may, in an action under [Section 11501], challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly we express no view on that issue.

Oklahoma Tax, 481 U.S. at 463 n.5 (emphasis added). In this case the courts below decided that question in the State's favor. Jt. App. 208-216, 252-258.

II. The "True Market Value" Of CSXT's Transportation Property In Georgia

A. *The State's Proposed Assessment.* In valuing CSXT's operating property for 2002 ad valorem tax purposes, the Georgia Department of Revenue used the unit rule, under which it first determined the value of CSXT's railroad as an entire operating system irrespective of where the operating property was located and without functional or geographic division of the whole into its component parts. Jt. App. 26, 200. The State's proposed assessment was based on an $8.2 billion unit value estimate for CSXT, with certain deductions, which was allocated to the State using the percentage of Georgia road miles to system road miles to arrive at the Georgia taxable fair market value of the rail assets. Jt. App. 202, 248. CSXT contends, however, that the railroad's system wide unit value was only $6 billion. Jt. App. 30, 195, 250.

Mr. Gregg Dickerson, the Revenue Department's Public Utility Manager, prepared the State's proposed assessment. Mr. Dickerson had worked at the Department of Revenue for approximately 10 years preparing public utility valuations before leaving in 1993 to take a position in the tax department at Norfolk Southern Railroad.[3]

[3] Mr. Dickerson is an appraiser with over thirty years' experience, including well over one thousand valuations performed under the unit rule. Jt. App. 172-174, 246-247. He has been a frequent speaker on such topics as the income approach and the use of market multiples and stock-and-debt methods as they apply to the unit rule valuation of

(Continued on following page)

Jt. App. 175-177, 246-247. When Mr. Dickerson returned to government service in 2001 the State was calculating unit values using a yield capitalization method that divided a first year's estimated free cash flow by a cost of capital minus a growth rate; a direct capitalization method; and a stock-and-debt method. Jt. App. 177-178, 247. For the tax year 2002, the State replaced the first two methodologies with discounted cash flow ("DCF") and market multiples methods, but it kept the stock-and-debt method. *Id.*

The State also instituted a change in 2002 for railroads that was not needed for other public utilities: it began to use income figures taken from the companies' annual reports to shareholders instead of their regulatory reports to the Surface Transportation Board ("R-1 reports") to project future cash flows in its DCF analysis. Jt. App. 178-183. CSX Corporation's Vice President and Controller acknowledged at trial that management's view of the railroad's financial performance was reflected in the annual report figures and not the R-1's. Jt. App. 186-188, 190, 233. The figures in these two reports can vary greatly,[4] and the largest part of the 47% increase in CSXT's 2002 assessment over 2001 was due to that change in the income amounts used to value the company. Jt. App. 179, 233.

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public utilities, including railroads; has taught unit rule valuation methodologies at both state and national educational programs; and has been published in various national journals and digests in the property appraisal and property assessment fields. Jt. App. 142-46.

[4] For example, CSX Corporation's annual report for 2001 showed that its rail segment had operating income of $743 million, but CSXT's R-1 report to the Surface Transportation Board reflected net revenue from rail operations of only $458 million for the same period. Jt. App. 179-182.

The State's DCF analysis yielded a 2002 unit value of $8.1 billion. Jt. App. 247. Its stock-and-debt method showed a unit value of $12 billion. *Id.* Mr. Dickerson derived three indicators of CSXT's unit value using the market multiples method from the amounts that his DCF showed as the railroad's operating revenues, operating EBITDA, and operating EBIT for the tax year 2002; those unit values were $12.3 billion, $10.7 billion, and $8.4 billion, respectively. Jt. App. 248. Mr. Dickerson concluded that a unit value of $8.2 billion was at the lower end of the range within which CSXT's true value would lie, and he chose that value to avoid litigation. Jt. App. 202, 248.

B. *CSXT's Appraisal.* CSXT relied on an appraisal by Mr. Thomas Tegarden, who derived unit value estimates of $9.637 billion, $5.983 billion, and $6.15 billion using a stock-and-debt method, a yield capitalization method, and a cost method, respectively. Jt. App. 250. He gave no weight to the stock-and-debt method and little weight to his cost method in concluding that CSXT's unit value was only $6 billion. *Id.*

III. The Rulings By The Courts Below

A. *The District Court.* The district court held that it could not consider Mr. Tegarden's valuation because it was prepared under different methods than the State's.[5] Jt. App.

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[5] Nevertheless, the court expressed serious reservations about the unit value estimate of CSXT's appraiser, as it failed at least one straightforward test of reasonableness. "If, as CSXT claims, the value of CSXT was $6 billion, CSXT would have a negative equity value. CSX Corporation [the railroad's parent], however, held investment grade bond ratings implying a profitability level in excess of that needed to

(Continued on following page)

214-216. In so holding, the district court agreed with the Fourth Circuit's analysis in *Chesapeake Western Railway. v. Forst*, 938 F.2d 528 (4th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992) ("*Chesapeake Western*"), and that of courts in the Eighth and Tenth Circuits, *see Union Pacific R.R. Co. v. State Tax Comm'n*, 716 F. Supp. 543 (D. Utah) ("*Union Pacific*"); *Burlington N. R.R. Co. v. Bair*, 815 F. Supp. 1223 (S.D. Iowa 1993), *aff'd*, 60 F.3d 410 (8th Cir. 1995), *cert. denied*, 516 U.S. 113 (1996) ("*Bair*"). Jt. App. 208-214. The district court recognized, of course, that it still had to "weigh the evidence and make its own factual findings regarding the true market value of CSXT." Jt. App. 214. That process was described by the court as follows:

> After parsing through days of expert testimony, the court concludes that the Department's DCF value as set out in its Proposed Valuation is the most accurate indicator of CSXT's unit value.[6] As a result, the court holds that, for purposes of applying the 4-R Act to the defendants' assessments of CSXT, the true market unit value of CSXT for the tax year 2002 was $7,726,293,350.

Jt. App. 229.[7] Using the State's track-mile allocation percentage and certain deductions, the court found that

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pay both current interest expenses and the principal balance of debt." Jt. App. 223 n.12.

[6] The court had carefully analyzed and rejected each of CSXT's myriad objections to the State's application of the DCF methodology. Jt. App. 218-221.

[7] "The court arrived at this number by taking the Department's $8,126,293,350 DCF value for CSXT and subtracting $400 million to account for CSXT's intangible property." Jt. App. 229 n.23.

"[t]he true market value of CSXT's taxable rail transportation property in Georgia for the tax year 2002 . . . was $509,560,171" and that there was no violation of Section 11501(b)(1). *Id.*

B. *The Eleventh Circuit's Decision.* The Eleventh Circuit affirmed the district court in a 2-1 decision, agreeing that CSXT could not challenge the State's valuation methodology. Jt. App. 252-258. In particular, the Eleventh Circuit upheld the district court's finding "that the appraisal prepared for the Railroad by Tegarden was based on a methodology different from the methodology used by the State." Jt. App. 260. According to the Eleventh Circuit, a valuation methodology "encompass[es] all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be." *Id.*

SUMMARY OF THE ARGUMENT

In *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), this Court expressly left open the question whether a railroad, in an action under Section 11501(b)(1) claiming that a state has overvalued its transportation property for tax purposes, is limited to disputing the way in which the state has applied a reasonable valuation methodology or may challenge the methodology itself by asking that true market value be recalculated under a different method. The Eleventh Circuit answered that question correctly in favor of the State. Section 11501(b)(1) sets limits upon state taxing authority, and well-established principles of federalism

require that Section 11501(b)(1) be construed narrowly to cover only those circumstances Congress clearly contemplated and addressed, not those where Congress' policy is uncertain. As this Court stated in *Dep't of Revenue of Or. v. ACF Industries*, 510 U.S. 332, 345 (1994), Section 11501 should not be extended "beyond its evident scope."

The statute does not "plainly" allow a railroad to challenge the true market value of its assets determined under a correctly applied, reasonable valuation method chosen by the state. Indeed, there are numerous ways in which to estimate the true market value of railroad property, and Congress did not clearly require states to use any particular method, leaving them free to choose from within the range of reasonable options available to them. In addition, Congress provided that the ratio of assessed value to "true market value" of other commercial and industrial property could be proved through a sales ratio study but did not prescribe a method for calculating that ratio for rail property. That fact indicates that Congress did not mean to take away the states' right to choose appropriate methods for estimating railroads' true market value. That reading of the statute is confirmed by the legislative history, during which railroad representatives told Congress that the Act was not meant to "require a state to change its assessment standards [or] assessment practices." Moreover, this Court's decisions approving the unit rule and formulary apportionment also recognize that states are entitled to latitude in estimating the value of taxable property within their jurisdiction, which is a latitude that CSXT would deny to states sued under Section 11501(b)(1).

CSXT claims that no workable line can be drawn between states' valuation "methods" and their "application."

However, the line between the unit rule and summation methods is clear. Nor is there, for example, a plausible argument that the stock-and-debt method is just a different "application" of a DCF method. There can be closer questions, but so far the courts have in practice been able to discern the appropriate line between different "methods" on the one hand and different "applications" of the same method on the other, even though the boundary may not always be perfectly distinct or easily described in the abstract. In order to avoid any possibility whatsoever of confusion at the margins, CSXT says that railroads should always be permitted to subject a state's valuation methodology to a battle of expert witnesses over whether it is "better" than any other method a railroad might wish to use. That solution is worse than the supposed problem, and it would turn district courts into federal boards of equalization and extend Section 11501(b)(1) well beyond its "evident scope."

ARGUMENT

I. Principles of Federalism Require That Section 11501(b)(1) Be Construed Narrowly In Favor Of A State's Right To Select Methods For Valuing Property For Tax Purposes

This Court long has recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981). *See also id.* at 102-03 ("the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts."). The reason for such restraint is obvious,

because "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). This proscription against federal interference in state tax matters is part of larger principles of federalism that have been described as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

Section 11501 was enacted against this strong background presumption that state tax administration normally should be free from federal interference. To be sure, the statute contains an express exception to the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), which ordinarily would bar federal jurisdiction in litigation like this as long as state law afforded a "plain, speedy and efficient remedy." *See* Section 11501(c). But the TIA is not the only reflection of this federal reluctance to intrude into state tax matters. *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) ("Since the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion. We subsequently relied upon the Act's *spirit* to extend the prohibition from injunctions to declaratory judgments regarding the constitutionality of state taxes.") (emphasis added)

(internal citations omitted); *id.* at 590 ("Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation."); *Fair Assessment*, 454 U.S. at 107 ("Because we decide today that the principle of comity bars federal courts from granting damages relief in [state tax] cases, we do not decide whether [the TIA], standing alone, would require such a result.").

The Court has held, for example, that 42 U.S.C. § 1983 does not provide a statutory basis for state courts to issue injunctive or declaratory relief in tax cases where there is an adequate state remedy at law. "The Tax Injunction Act does not prohibit state courts from entertaining § 1983 suits that seek to enjoin the collection of state taxes." *Nat'l Private Truck Council*, 515 U.S. at 588. Rather, "the Tax Injunction Act reflects the congressional concern with *federal* court interference with state taxation, and there is no similar statute divesting state courts of the authority to enter an injunction under federal law when an adequate legal remedy exists." *Id.* at 590 (internal citation omitted). The Court nevertheless concluded in *National Private Truck Council* that

> [i]n determining whether Congress has authorized state courts to issue injunctive and declaratory relief in state tax cases, we must interpret § 1983 in light of the strong background principle against federal interference with state taxation. Given this principle, we hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists.

Id. at 589. *Accord General Motors Corp. v. City and County of San Francisco*, 81 Cal. Rptr. 2d 544, 551 (Cal. Ct. App. 1999) ("the principle of federal constraint in the area of state taxation applies not only to federal courts but also to [the interpretation of] federal legislation," citing *Nat'l Private Truck Council*, 515 U.S. at 589). Section 11501 must be construed with that same background principle in mind, even though the TIA itself does not bar this litigation. Moreover, as an exception to the broader policy of federal non-interference only partially codified in the TIA, Section 11501 should be read to extend only to those circumstances Congress clearly contemplated and addressed, not to those where Congress' policy is uncertain. *See California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982) ("In order to accommodate . . . concerns [about interfering with the operation of state tax systems] . . . we must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act.").

This Court already has recognized that these rules of statutory construction apply in interpreting Section 11501. In *Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332 (1994) ("*ACF Industries*"), the Court held that Section 11501(b)(4) – which prohibits the imposition of "another tax that discriminates against a rail carrier providing transportation" – does not limit a state's discretion to exempt non-railroad property from generally applicable ad valorem property taxes.

> Principles of federalism support, in fact compel, our view. [Section 11501] sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. When determining the breadth of a federal statute that impinges upon or pre-empts

> the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." As explained above, neither [the particular subsection] nor the whole of [Section 11501] meets this standard with regard to the prohibition of property tax exemptions.

ACF Industries, 510 U.S. at 345 (internal citations omitted). Section 11501(b)(1) therefore should be construed narrowly in favor of a state's right to select for itself a reasonable method for valuing railroad property.[8] *See* Jt. App. 257 ("Based on the reasoning of the Court in *ACF Industries*, we conclude that railroads may not challenge state methodologies under subsection (b)(1).")

This same recognition of and respect for the place that the individual states occupy as sovereigns along with the United States in our federalist system of government is reflected in the "clear statement rule," upon which the Eleventh Circuit relied in its ruling below. *See* Jt. App. 257 ("The text of the Act does not clearly state that railroads may challenge valuation methodologies. Without that clear statement of congressional intent, the argument of the

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[8] The district court correctly noted that the DCF, stock-and-debt, and market multiples approaches used by the State in this case are "widely accepted and used by valuation experts." Jt. App. 212. *See also Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce*, 90th Cong. 66 (1967) ("Highly refined techniques exist for measuring railroad values using such techniques as capitalizing railroad operating income, using the market values of stocks and bonds, and determining depreciated reproduction costs.") (statement of Rolf A. Weil, President, Roosevelt University).

Railroad fails.") It cannot be presumed that Congress intended to regulate the "substantial sovereign powers" of states unless the federal statute in question is unmistakably clear in that regard. As this Court has stated, "in traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citations and internal quotation marks omitted). Under the clear statement principle, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460-61 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted). Indeed, Congress' intent must be " 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. This principle has been applied in a variety of contexts involving federal regulation of the "substantial sovereign powers" of the States. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (whether the federal supplemental jurisdiction statute tolls the statutes of limitation for state law claims in state court); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73-74 (2000) (whether a federal statute abrogates state sovereign immunity); *Gregory*, 501 U.S. at 461-67 (whether the federal Age Discrimination in Employment

Act applies to state judges); *Will*, 491 U.S. at 65 (whether states are "persons" that may be sued under 42 U.S.C. § 1983); *Rice*, 331 U.S. at 230 (whether a federal statute preempts state law).

CSXT maintains that federalism concerns are inapplicable here because "this Court in *Oklahoma Tax* rejected the invocation of 'comity' with the States." Pet. Brief, p. 42. In fact, the Court disagreed with state officials' broad claim in *Oklahoma Tax* that a railroad could never dispute the state's valuation in an action under Section 11501(b)(1), holding that principles of federalism could not support that position because the statute unambiguously allowed an overvaluation claim:

> Respondents contend that injunctive relief against state taxation offends the principles of comity. The Court of Appeals found that its restrictions on valuation actions under [§ 11501] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delay of the state tax collection process." These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Oklahoma Tax, 481 U.S. at 464. By contrast, Section 11501(b)(1) does not clearly say that railroads may go beyond challenging the application of a state's reasonable valuation method and urge the district court to reject that methodology in favor of another.

CSXT also argues that "Congress has already balanced federal and state interests in § 11501(b)(1)." Pet. Brief, p. 42. That argument proves too much and would swallow the "clear statement" rule this Court has long

applied, for Congress can always be said to have balanced federal and state interests when it enacts legislation affecting the states. The real question is where that balance has been struck. Although Congress included some provisions to address specific issues raised by the states during hearings on the statute and its predecessor versions – like the 5% threshold set out in § 11501(c)[9] – these did not eliminate federalism entirely as a factor in ascertaining the Act's proper scope. For example, CSXT points to the fact that the 4-R Act did not become effective until three years after its enactment as proof that Congress rejected the federalism concerns that this case presents. Pet. Brief, p. 43 ("[I]n order to give the States an opportunity to bring their taxation practices into compliance, Congress granted a grace period of three years before § 11501 went into effect.") The provision construed in *ACF Industries* was subject to the same delayed effective date, and this gave the Court no pause in concluding

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[9] George Kinnear, Director of the Washington Department of Revenue, proposed the 5% tolerance factor to accommodate one State practice unrelated to discrimination against common carriers: "Another example is to be found in the Tolerance factors built into the ratio studies of various States. Oregon has one now and Washington is presently considering the establishment of such a Tolerance. If, under this practice, a given assessor claims to be assessing at 25% of full value and the conclusion of the State Ratio Study results in a difference of not more than 5% (i.e., 23.75% ratio), the state will concede a possible error in judgment and officially conclude the assessor's claimed ratio to be correct. Yet in the case of State assessed properties, such as common carriers, this difference in finding in the allowance of the Tolerance could be claimed as a base for challenging the tax assessments and levies of the railroads." *State Tax Discrimination Against Interstate Carrier Property: Hearing On S. 2289 Before the Subcomm. On Surface Transportation of the S. Comm. On Commerce*, 91st Cong. 100 (1969) (statement of George Kinnear, Director, Washington Department of Revenue).

that "[p]rinciples of federalism support, in fact compel, our view [of the statute's reach]." *ACF Industries*, 510 U.S. at 345.

Despite CSXT's suggestion to the contrary, *see, e.g.*, Pet. Brief. p. 2 ("the valuation approaches at issue here are simply standard appraisal tools"), a state's decision on how best to value railroad property involves legitimate policy choices to which principles of federalism demand deference. *See Louisville & Nashville R.R. Co. v. Dep't of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984) ("These arguments broach delicate issues implicating the state's traditional authority to select methods of valuation.") A state's decision to use a summation approach instead of the unit rule is quintessentially a matter of policy, and Congress could not have contemplated that the courts would second guess that selection based on competing expert testimony about which economic theory supposedly estimates "true market value" more accurately for rail property. To calculate a railroad's unit value, a state might, for example, choose to use a direct capitalization method instead of a DCF analysis because of "the state's limited resources and the tremendous time pressures under which the state's appraisals must be prepared." *Union Pacific*, 716 F. Supp. at 557. *See also* Jt. App. 255 ("Time pressures and limited resources . . . may compel a state to choose a simple valuation methodology rather than a complicated one."); *Bair*, 815 F. Supp. at 1229 n.4 ("[A] DCF requires much research and is complex. It is doubtful [a] DCF would be practicable for the state to employ to value all railroads in its jurisdiction every two years.") A state might prefer a method, like the stock-and-debt approach, that is based on historical and market data readily available to the state and the affected taxpayers,

both for its relative ease of application and its transparency. The Eleventh Circuit properly took these policy concerns into consideration when refusing, as this Court did in *ACF Industries*, "to extend the statute beyond its evident scope." Jt. App. 255. *See also Chesapeake Western*, 938 F.2d at 531 ("[w]hile [Section 11501] was passed as an express exception to the policy of non-interference [in state tax decisions], we are not inclined to disregard this general policy in areas where [Section 11501] does not plainly authorize such an exception."); *Union Pacific*, 716 F. Supp. at 552 ("The question . . . is whether the state is free to choose among accepted valuation methods or whether the 4R Act compels the use of one particular method. . . . [T]his court has found nothing in the 4R Act itself . . . that requires this court to make the state apply a particular valuation methodology."); *Bair*, 815 F. Supp. at 1228-29 (same).

II. Section 11501(b)(1) Does Not "Plainly" Allow A Railroad To Challenge The True Market Value Of Its Assets Determined By Correctly Applying A Reasonable Valuation Methodology Chosen By The State

Much of CSXT's brief is devoted to the theme that Section 11501(b)(1) "plainly" permits a railroad to challenge the true market value of its assets determined under a correctly applied, reasonable valuation method chosen by the state. But there is more than one way to estimate the value of railroad property, and Section 11501(b)(1) – even if viewed in isolation – does not "plainly" allow railroads to subject a state to a battle of expert witnesses over whether the railroad has a method that is "better" than the state's, turning the district court into a federal

board of equalization. The provisions in subsection (c) on how to calculate the ratio of assessed value to true market value of other commercial and industrial property also support the Eleventh Circuit's reading of Section 11501(b)(1).

A. The "true market value" of railroad property can be estimated in more than one way

Valuation is not a matter of mathematics. *Hamm v. Comm'r*, 325 F.2d 934, 940 (8th Cir. 1963). Rather, "[t]he concept of true market value is inherently an approximation, in some sense a fiction, since there is no such thing as a perfect market." *Chesapeake Western*, 938 F.2d at 531. "A market deals with ranges of value rather than one set value," *Southern Pac. Transp. Co. v. Dep't of Revenue*, 1989 Ore. Tax LEXIS 1, **42, and federal courts therefore have recognized that the "true market value" of railroad property can be estimated in more than one way.

During the congressional hearings eventually leading to the passage of the 4-R Act, a railroad industry representative acknowledged that "[i]n the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement." *Tax Assessments On Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. On Transportation and Aeronautics of the H. Comm. On Interstate and Foreign Commerce*, 88th Cong. 18 (1964) (statement of James N. Ogden, Vice President of the Gulf, Mobile & Ohio Railroad). Indeed, if a state has decided to use the unit rule in estimating the value of a railroad's property in its jurisdiction, there are multiple methods from which to choose for arriving at a unit value, including

the stock-and-debt, DCF, and market multiples approaches used by the State in this case. *See Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce*, 90th Cong. 66 (1967) ("Highly refined techniques exist for measuring railroad values using such techniques as capitalizing railroad operating income, using the market values of stocks and bonds, and determining depreciated reproduction costs.") (statement of Rolf A. Weil, President, Roosevelt University). Each such method, when properly applied, will give an estimate of "true market value," and Section 11501(b)(1) does not "plainly" allow a railroad to dispute true market value determined by the state in that way by urging the district court to use a different method to estimate value. As noted by the Fourth Circuit, "[t]here is no absolute way to test the assertions of competing valuations or competing claims of correspondence to 'true market value,' if such a thing exists in the order of things." *Chesapeake Western*, 938 F.2d at 532 (quoting *Union Pacific*, 716 F. Supp. at 553). The Fourth Circuit embraced this "rich explanation of the problem":

> [V]aluation is an art, not a science. . . . Absent a miracle of time, place, and circumstance – willing buyer, willing seller, high noon, January 1, 1984, for example – true market value for the purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers endowed with money and desire, whose desires are said to converge in a dollar description of the asset.

Chesapeake Western, 938 F.2d at 532 (quoting *Union Pacific*, 716 F. Supp. at 554).

CSXT's arguments are based in part on Congress' use of the word "true" in the statutory term "true market value," which CSXT takes to mean a *single best* estimate of the railroad property's value. *See* Pet. Brief, pp. 30-31 ("Congress's charge to a district court . . . to determine the '*true* market value' of railroad property . . . requires an independent and neutral finding by the district court of the market value of the property that is 'true' based on the available evidence presented by the parties."); *see also* Brief of Amicus Curiae Association of American Railroads In Support of Petitioner ("AAR Amicus Brief") p. 16 ("Congress . . . meant what they said: 'true' means true. . . .") But the word "true" cannot bear the weight that CSXT and its supporters place upon it. As explained by the railroad proponents of this legislation:

> "True market value" is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than "true market value" may be computed. In an authoritative treatise published by the National Association of Tax Administrators, the following statement appears:
>
> "The statutes of the several States prescribing the value standard for tax purposes use such terms as 'fair market value,' 'fair cash value,' 'full market value,' and the like. All of these terms are synonymous: they mean nothing more and nothing less than what we mean in this report by the term 'market value' or the word 'value' without a qualifying adjective."

Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce, 90th Cong. 29 (1967) (statement of James A. Ogden, Vice President and General Counsel, Gulf, Mobile & Ohio Railroad). Congress accepted this definition. S. Rep. No. 90-1483, at 10 (1968); *id.* at App. B. In other words, Congress could just have easily referred to the ratio of assessed value to "fair" market value, and it hardly is "unfair" to compute market value by correctly applying a reasonable valuation method.

CSXT argues that a railroad should not be limited to proving its "true market value" under a state's chosen valuation methodology because "ascertaining true market value for any property *requires* . . . taking into account *all* the pertinent factors that influence market value." Pet. Brief, pp. 8-9 (emphasis added). Petitioner does not truly believe that statement, because it elsewhere asserts that the stock-and-debt method should *not* be used to derive a railroad's unit value, even though this Court long ago accepted that approach. As this Court stated in *State Railroad Tax Cases*, 92 U.S. 575, 605 (1876):

> [W]hen you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have by the action of those who above all others can best estimate, ascertained the true value of the road, all its property, its capitalized stock and its franchises; for these are all represented by the value of its bonded debt and the shares of its capital stock.

See also Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 222 (1897) ("The value which property bears in the market, the amount for which its stock can be bought

and sold, is the real value."); S. Rep. No. 87-445, at 456 (1961) ("Doyle Report") ("Next to capitalization of earnings, as a means to determine carrier system value, the market value of stock and debt has widest acceptance as an evidence of value.") CSXT appears to believe that the 4-R Act essentially overruled this Court's prior decisions, because it argues that it should be allowed "to prove in court that a stock-and-debt method cannot reliably estimate 'true market value.'" Pet. Brief, p. 32.

In any event, it is incorrect to claim that a railroad, in order to prove the true market value of its property, must be free to derive that value under whatever approach it thinks is best, even if the taxing jurisdiction has adopted a different valuation method from within the range of reasonable options available. Even the Uniform Standards of Professional Appraisal Practice ("USPAP"), the generally accepted standards for professional appraisal practice in North America, acknowledges that its provisions can be "void and of no force and effect" in a particular appraisal assignment because of contrary state law or public policy. USPAP, "Jurisdictional Exception" (2006 ed.). By refusing to afford the states any latitude in choosing appropriate methods for estimating the value of property within their jurisdictions, CSXT would turn the district courts into federal boards of equalization required to oversee protracted, complicated battles between expert witnesses over whose method is "best."

During the oral argument in *Oklahoma Tax* the following exchange occurred between the Court and counsel for the railroad:

> Question: Will you concede then that all the federal court would have to do is use whatever

> methodology the state used, assuming that was a reasonable methodology?
>
> Mrs. Christian: We think the door would have to be open for the railroad to challenge a particular methodology as not being a reasonable methodology.
>
> Question: Right.
>
> Mrs. Christian: But given that caveat, yes his role would be to determine on the basis of the evidence before him, which would include the evidence of the state's expert and the railroad's expert as to whether these methodologies have been properly applied.[10]

Transcript of Oral Argument, *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454 (No. 86-337), 1987 U.S. TRANS LEXIS 61 at *12. The Deputy Solicitor General, representing the United States as an amicus supporting the railroad, was asked the same question:

> Question: Do you agree with Mrs. Christian as to what has to be accepted? That the federal court has to accept any manner of assessment adopted by [the] state, methodology adopted by the state if it's a reasonable one?
>
> Mr. Lauber: I would agree that there are probably some methodologies like [undepreciated] book cost, that simply would be ridiculous . . .

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[10] Counsel later tried to withdraw that concession, stating "Justice Scalia, I apologize if I said . . . the court would have to accept the [state's] methodology. Certainly the railroad's witnesses would be free to state that they believe other methodologies were preferable."

> Question: I understand. But more in the range of reasonable ones, the federal court has to accept whatever the state applies?
>
> Mr. Lauber: I would say it ought to accept it. It should listen to arguments that they're out of line, but ought to normally accept the state's methodology.

Id. at *27. That response echoed the Solicitor General's amicus brief in that case, which stated that Section 11501(b)(1) applied:

> to overvaluations that result from an assessment rule or methodology that – either on its face or as applied – *systematically* determines excessive values for rail property. On the other hand, if a railroad, like any other state taxpayer, asserts only that the state made an error in reaching an excessively high value for its property, no relief for that overvaluation claim would be available under [the statute].

Brief for the United States as Amicus Curiae Supporting Petitioner, *Oklahoma Tax*, No. 86-337, p. 25 n.14 (Dec. 12, 1986) (emphasis added). These statements demonstrate that Section 11501(b)(1) is anything but plain on the question presented here.

B. Section 11501(c)'s provisions on how to compute the ratio of assessed value to true market value of other commercial and industrial property support the Eleventh Circuit's reading of Section 11501(b)(1)

CSXT asserts that "subsection (c)'s provisions allowing proof of the market values of other commercial and industrial property underscore that the district court is to

determine the true market value of property independently, regardless of what methods the state appraiser employs." Pet. Brief, p. 34.[11] In fact, those provisions support the Eleventh Circuit's holding. Section 11501(c) provides for the use of a "sales assessment ratio study," which compares the sales prices of a sample of recently sold properties with their assessed values. *See Oklahoma Tax*, 481 U.S. at 461-62; S. Rep. No. 90-1483, at 23-24 (1968). This calculation is possible only because for non-rail property there is an ongoing market that produces actual sales prices. By contrast, the 4-R Act prescribes no method for calculating the ratio of assessed value to market value for rail property. While this omission does not indicate that the value of "[rail] property may not be proved *at all*," *Oklahoma Tax*, 481 U.S. at 463 (footnote omitted and emphasis added), it does support the conclusion that Congress did not mean to take away the states' right to choose for themselves appropriate methods for estimating the value of railroad property in their jurisdictions.

In addition, ascertaining the ratio of assessed value to true market value for "all other commercial and industrial property in the same assessment jurisdiction" is not the same as the individualized inquiry involving a particular railroad's ratio. The first task is designed to see how the taxing authorities have treated a "hypothetical 'average'

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[11] CSXT also points to the provision in subsection (c) that "[t]he burden of proof in determining assessed value and true market value is governed by State law," arguing that Congress would not have required railroads to prove their value but then limited them to adducing evidence that was relevant under the State's chosen valuation methodology. Pet. Brief, p. 34. However, CSXT does not explain why it thinks that is a logical disconnect.

taxpayer" in the assessment jurisdiction. S. Rep. No. 91-630, at 26 (1969).

> In making this comparison, the bill contemplates the relationship between a common carrier's property and that of the "average" taxpayer in the taxing district. However, the word "average" has a precise arithmetical connotation which makes it unsuitable in this context.
>
> For simplicity, therefore, the phrase "all other property in the taxing district"[12] has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property.

Id. Accord Arizona v. Atchison, Topeka & Santa Fe R.R. Co., 656 F.2d 398, 404 (9th Cir. 1981) ("The legislative history is clear that Congress understood the term 'all other [commercial and industrial] property' to mean property in the aggregate.") Looking at other commercial and industrial property "in the aggregate" could require examining hundreds or thousands of such properties, and it could be extremely difficult (if not impossible) to determine what method local assessors used to value each such property and then to calculate its "true market value" in similar fashion. By allowing sales ratio studies, Congress opted for the most efficient way to compute an assessment ratio for what was intended, at the end of the day, to represent only a hypothetical "average" taxpayer in the comparison group. Congress did not thereby imply that

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[12] Before the statute was enacted the comparison group was narrowed to "all other commercial and industrial property."

railroads could freely attack a state's reasonable method for estimating the true market value of the railroads' property in that jurisdiction.

III. The 4-R Act's Legislative History Confirms That Congress Did Not Intend For Courts To Displace A State's Choice Of An Appropriate Method For Valuing Railroad Property

Courts that have considered the 4-R Act's legislative history have found that this history, while it does not deal extensively with the issue presented in this case, confirms that Congress did not intend to displace a state's legitimate policy choices when selecting an appropriate method for valuing railroad property. Jt. App. 210, 211, 257; *Chesapeake Western*, 938 F.2d at 531 ("the history that does exist suggests that Congress did not intend for courts to displace the state's policy choice about what constitutes the best method for determining true market value of railroad land."); *Union Pacific*, 716 F. Supp. at 553 ("the legislation history suggests that the statute was not meant to dictate a state's choice of methodology, at least as long as the methodology chosen had a rational basis and was not chosen for a discriminatory purpose."); *Bair*, 815 F. Supp. at 1229 (same). During the hearings leading eventually to the 4-R Act's adoption, representatives of the railroads were asked what effect the proposed legislation would have on state valuation methodologies.[13] These

[13] "With the passage of the 4R Act, Congress capped a seventeen-year effort to equalize railroad property taxes. . . . The legislative history of nearly identical antecedent proposals is unquestionably relevant and material for a complete understanding of the text before the court." *Louisville & Nashville R.R. Co. v. Dep't of Revenue*, 736 F.2d

(Continued on following page)

representatives advised Congress that the railroads generally were satisfied with the methods that states employed when valuing their property. James N. Ogden, Vice President of the Gulf, Mobile & Ohio Railroad, appearing on behalf of the Association of American Railroads ("AAR"), stated:

> The principal problem in the matter of railroad assessments is not one of how to value a railroad. In the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement. . . . The real problem is to determine how much of the valuation that has been found should be assessed, which, in turn, depends upon how much of the valuation of other property is assessed. In other words, the problem is how to get the tax assessors in the several States to equalize the railroad's assessment with that of other property in the same taxing district.

Tax Assessments On Common Carrier Property: Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. On Transportation and Aeronautics of the H. Comm. On Interstate and Foreign Commerce, 88th Cong. 18-19 (1964). *See generally Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce*, 90th Cong. 66 (1967) ("Highly refined techniques exist for measuring railroad values using such techniques as capitalizing railroad operating income, using the market values of

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1495, 1498 n.6 (11th Cir. 1984). *Accord Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981).

stocks and bonds, and determining depreciated reproduction costs. These valuation methods certainly produce results which provide sufficiently accurate measures of value to make valid comparisons [with other properties' values]") (statement of Rolf A. Weil, President, Roosevelt University). Philip M. Lanier, Vice President of the Louisville & Nashville Railroad, also appearing on behalf of the AAR, was asked to describe Wyoming's valuation procedures:

> It is what we call a three factor formula. The factors of the formula are the net railroad operating income over the preceding 3 years capitalized at 8 ¼ percent; 1 year stock and debt, that is . . . the market value of the stock and debt; and the replacement cost of the property less depreciation with allowance for obsolescence.
>
> . . . These three factors would be computed and averaged and the resulting value – this gives you the system value of the whole railroad. . . .

State Tax Discrimination Against Interstate Carrier Property: Hearing On S. 2289 Before the Subcomm. On Surface Transportation of the S. Comm. On Commerce, 91st Cong. 38 (1969). Mr. Lanier then was asked "[i]s this same formula – this same three-factor formula in use . . . throughout the country, or is this only the way it is done in Wyoming," to which Mr. Lanier replied, "[t]he formula varies from State to State and we are not dealing with the valuation question. This is not our problem." *Id.* at 39. In a subsequent hearing, Mr. Lanier also stated that "[t]he standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation." *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 Before the Subcomm.*

On Transportation and Aeronautics of the H. Comm. On Interstate and Foreign Commerce, 91st Cong. 138 (1970) (statement of Philip M. Lanier, Vice President, Louisville & Nashville Railroad).

What the railroads and their supporters had to say about the Act's meaning was taken seriously by Congress and should be given weight here because the railroad industry was in effect the primary sponsor of the legislation. In 1961, the Association of American Railroads had proposed to a special congressional study group an anti-discrimination tax law with many of the essential provisions contained in what became the 4-R Act. *See* S. Rep. No. 87-445, at 465 (1961) (suggested legislation giving federal courts jurisdiction to enjoin "[t]he assessment, for the purposes of a property tax levied by any taxing district, of property owned or used by any common carrier engaged in interstate commerce at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the taxing district subject to the same property tax levy bears to the true market value of all such property.") Thereafter, in 1967, the railroads told members of Congress that the proposed legislation that was then pending in the Senate:

> does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.

Discriminatory Taxation Of Common Carriers: Hearings on S. 927 Before the Subcomm. On Surface Transportation of the S. Comm. On Commerce, 90th Cong. 29 (1967) (statement of James N. Ogden, Vice President, Gulf, Mobile & Ohio Railroad). Virtually identical language subsequently appeared in S. Rep. No. 90-1483, at App. B (1968) as part of the Senate committee's explanation of how the proposed legislation was meant to apply.

CSXT contends that the Eleventh Circuit has "misread" that record. Pet. Brief, p. 49. According to CSXT, testimony before Congress that the proposed legislation "does not suggest or require a State to change its assessment standards [or] assessment practices" meant simply that "States could continue to use whatever methods they liked" even if a district court rejected those methods and found that true market value should be computed in another way, because "courts could not issue injunctions dictating what valuation and assessment methods States must use going forward in imposing taxes." Pet. Brief, p. 50. That is a pinched reading of what the railroads told Congress when trying to get their legislation passed and an exceedingly strange view of how litigation works in the real world. If fair market values that the state calculates for railroads using valid, properly applied methodologies can successfully be attacked in federal court through the use of different methodologies, the state – unless it wishes constantly to be engaged in expensive, protracted litigation – will have no real choice but to change its assessment practices. The Solicitor General counters by saying that "some States do not . . . base assessments on true or fair market value." Brief of the United States as Amicus

Curiae Supporting Petitioner ("U.S. Brief"), p. 17.[14] But Congress adopted the term "true market value" with the understanding that "'[t]rue market value' is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than true market value may be computed." S. Rep. No. 90-1483, at App. B (1968).[15] *See also* S. Rep. No. 87-445, at 455 ("Different methods are employed by the various States to find value, but for ad valorem taxation the goal is to find market value.") If a taxing jurisdiction nevertheless were to assess railroad property according to an entirely different standard, that fact would mean only that whatever valuation methodology the tax officials used – being designed to arrive at something other than "true market value" – could not factor into the district court's decision.

CSXT maintains that "[t]hroughout the debate on proposed legislation, it was well understood that allowing railroads to attack discriminatory taxes . . . would entail judicial scrutiny of state valuation procedures." Pet. Brief, pp. 47-48. No one questions that in an action under Section 11501(b)(1) district courts may thoroughly examine whether a state has applied its particular valuation

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[14] CSXT disagrees. *See* Pet. Brief, p. 7 ("In some states the assessed value is equal to the market value; in others assessed value is a specified percentage of the market value. . . . In *every* jurisdiction assessing an ad valorem tax, therefore, the market value of the subject property directly affects the total amount of the tax.") (emphasis added).

[15] In fact, that is precisely what the railroads told Congress. *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the S. Comm. on Commerce*, 90th Cong. 29 (1967) (statement of James A. Ogden, Vice President and General Counsel, Gulf, Mobile & Ohio Railroad).

method correctly, and the district court did so in this case.[16] But in advocating its much more expansive reading of the statute, CSXT looks to comments made during the legislative debates by opponents of the legislation. *Id.* at 48. This Court has said that such "statements are entitled to little, if any, weight," *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 855 n.15 (1984), because "[i]n their zeal to defeat a bill, [its opponents] understandably tend to overstate its reach." *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639-40 (1967). *Compare State Tax Discrimination Against Interstate Carrier Property: Hearing On S. 2289 Before the Subcomm. On Surface Transportation of the S. Comm. On Commerce*, 91st Cong. 80 (1969) ("Under the language of the bill as presently drafted, it is my opinion that a railroad would be entitled to [an assessment at the lowest percentage of value applicable to any other class of property]") (statement of Charles F. Conlon, Executive Secretary, National Association of Tax Administrators) *with Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 404 (9th Cir. 1981) ("The language was not meant to permit railroads to demand the same treatment as those holding property with the lowest assessment ratio"). CSXT also relies on a suggestion by one state taxing official, not taken by Congress, to define "true market value" as "that true market value finally determined in accordance with

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[16] The district court carefully considered and rejected CSXT's challenges to the "comparability" of the Class I railroads that Mr. Dickerson selected to estimate CSXT's unit value under the "market multiples" method, his stock-and-debt method, virtually every assumption made by Mr. Dickerson in applying the DCF method (including the terminal growth rate and projected operating ratio in year 2011), and Mr. Dickerson's "leased equipment" adjustment. Jt. App. 217-229.

state statutory procedures." Pet. Brief, p. 48; *State Tax Discrimination Against Interstate Carrier Property: Hearing On S. 2289 Before the Subcomm. On Surface Transportation of the S. Comm. On Commerce*, 91st Cong. 102 (1969) (statement of George Kinnear, Director, Washington Department of Revenue). But Congress easily could have felt that such a provision would sweep too broadly and preclude any review of a state's value determination as long as it had been made in compliance with all state procedural requirements – such as timeliness, notice to the taxpayer, etc. – even if it were based on a misapplication of that state's particular valuation methodology.

CSXT claims that "[a]s documented in congressional studies and hearings, the valuation methods and practices that the States employed were a major source of discrimination against the railroads." Pet. Brief, p. 21. In reality, from all the discussions about the unit rule, different apportionment formulas, and methods such as capitalized income and stock-and-debt, the only real concern to emerge involved what was described as "outmoded" or "outdated" procedures. *See, e.g.*, S. Rep. No. 87-445, 448 (1961) ("discrimination results . . . by virtue of outmoded assessing procedures.") *id.* at 451 (reference to "outdated" procedures). No one questioned the states' right to value railroad property using reasonable, correctly applied methods.

IV. This Court's Decisions Approving The Unit Rule And Formulary Apportionment Recognize That States Are Entitled To Latitude In Estimating The Value Of Taxable Property Within Their Jurisdiction

In determining how best to estimate the "true market value" of railroad property within its jurisdiction, a state must first choose between the unit rule and summation approach and, if the former, then select an apportionment formula for assigning a portion of the railroad's unit value to the state. This Court's decisions upholding the unit rule and formulary apportionment recognize that states are entitled to latitude in this regard. CSXT, on the other hand, would not afford the states any leeway in estimating the value of railroad property within their jurisdictions when they are sued under Section 11501.

"[T]he 'unit rule' developed in the late nineteenth century for apportioning property values of railroad, telegraph, and express companies to state or local taxing jurisdictions." 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 8.07[1] (3d. ed. 2000).

> To ascertain the value of a company's property that was properly attributable to the taxing jurisdiction, states and localities would determine the value of the entire operating system and then assign to the state or locality a proportion of the system value based on the ratio of the amount of some identifiable factor within the state to the amount of such factor in the entire system.

Id. See also S. Rep. No. 87-445, at 455 (1961) ("The major procedural steps in the assessment of railroads and pipelines [include]: (a) Determination of the value of the property as a unit; [and] (b) Allocation of the system value

to the State"); 2 James C. Bombright, *The Valuation Of Property* 633 (1st ed. 1937) ("Under [the unit] rule, in its more thoroughgoing form, the entire enterprise is first valued as a unit, some 'fair share' of this value (perhaps after the deduction of certain asset values deemed inappropriate for allocation) being attributed to the particular state or district that is imposing the tax.").[17] Well over one hundred years ago, this Court held that a state was free to choose this method for estimating the taxable value of property within its jurisdiction:

> It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length of the track within its limits.
>
> . . . But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track is of little value. . . . It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road,

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[17] 2 James C. Bombright, *The Valuation Of Property* at 633 n.1 ("The term 'unit rule' is often used in its broadest sense, to denote any assessment . . . under which the value of . . . property located within a specific geographical area is taken to be equal to a certain share of the value of . . . a larger aggregate of property, of which the former property is an integral part. When used in this broad sense, the unit rule does not necessarily require a valuation of an entire business enterprise.")

> and apportion the value within the county by its relative length to the whole.

State Railroad Tax Cases, 92 U.S. 575, 608 (1875).[18] At the same time, the Court said that this method was permissible rather than mandatory, and at least one state supreme court has held that state law did not allow the unit rule. *See County Bd. of Arlington County v. Commonwealth of Va. Dep't of Tax'n*, 240 Va. 108, 112 (1990) ("Generally, in assessing real estate for local taxation, the commissioner should seek to determine its fair market value by a consideration of its highest and best use in its *particular* location. The commissioner testified, however, that his appraisals do not reflect the fair market value of Potomac Yard in its particular location, but do reflect its fair market value as a part of the railroad unit.") (internal citations omitted); *Chesapeake Western*, 938 F.2d at 529-30 ("The Virginia Supreme Court ... held that the unit method constituted a business tax rather than a real property tax and it struck down its use as unconstitutional.")

It is impossible to coax from the 4-R Act any intimation that Congress intended to limit states' latitude in deciding to adopt either the unit rule or the summation approach for estimating the "true market value" of railroad assets within their jurisdictions. Although CSXT is careful not to tip its hand too obviously in this regard,

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[18] "While the Court's articulation of the unit rule [in *State Railroad Tax Cases*] was addressed to the apportionment of the railroad's property among counties rather than among states, the Court subsequently applied the same principles to disputes [that] involved interstate values." 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 8.05 n.164.

accepting the company's arguments would make even that most fundamental methodological choice fair game under Section 11501(b)(1) any time a railroad thinks that the approach not selected by the state is "better." *See* Pet. Brief, p. 32 ("under the Eleventh Circuit's rule ... [r]ailroads would be unable to present their own, better evidence of value"); *id.* at 28 ("Neither the value of the property nor the methodology for determining that value may be altered by legislative policy.") Indeed, the railroads launched just such an attack in *Chesapeake Western*, urging the Fourth Circuit "not only to reject Virginia's inventory and summation approach but also to dictate to Virginia the specific valuation method that [the railroads alleged] produces the 'correct' market value," which they contended in that case was the unit rule. *Chesapeake Western*, 938 F.2d at 532 n.4. CSXT has said that *Chesapeake Western* was "wrongly decided" in favor of the state, leaving "a gaping loophole in Congress' prohibition of discriminatory valuation of railroad property." COA Reply Brief of Appellant, p. 11.

States also must select methods for apportioning a railroad's total unit value. "Apportionment, under which the measure of a tax is divided by formula, is based on the use of selected factors for attributing the tax base to the states in which the taxpayer employs its property or carries on its activity." *State Taxation*, ¶ 8.05. *See, e.g.*, S. Rep. No. 87-445, at 457 (1961) ("Factors used to apportion to each State its proper share of the system value include: traffic units, gross earnings, car mileage, transportation train-miles, [and] miles operated"). "[T]he States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders," *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 324 (1968), even when "it could

not be demonstrated that the results they yielded were *precise* evaluations of assets located within the taxing State." *Id.* (emphasis added). *See also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) ("the States have wide latitude in the selection of apportionment formulas and [the result] . . . will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' or has 'led to a grossly distorted result') (quoting *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 135 (1931) and *Norfolk Western*, 390 U.S. at 326). CSXT would deny the states any latitude in estimating the "true market value" of railroad property within their jurisdictions when sued under Section 11501(b)(1).

V. The Distinction Between A Valuation "Method" And Its "Application" Has Proved Workable In Practice

CSXT did not seek review of the Eleventh Circuit's decision upholding the district court's finding that the railroad's appraiser used a valuation methodology different from the State's. Consequently, if this Court holds that Section 11501(b)(1) limited CSXT to challenging the application of the State's valuation methodology, the Eleventh Circuit should be affirmed. However, to support its claim that this Court should not recognize *any* distinction whatsoever between states' valuation "methods" and their "application," CSXT says that no workable line can be drawn between the two. While the Court in *Oklahoma Tax* did not resolve the question whether a state's valuation methodology may be disputed under Section 11501(b)(1), it still noted a difference between a challenge

to "the valuation methodology employed by [a state]" and "the application of that methodology." 481 U.S. at 463 n.5. That statement hardly suggests that this Court considered the distinction meaningless.

The Eleventh Circuit concluded that a State's valuation "methodology" consists of "all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be." Jt. App. 260. *Cf. Oklahoma Tax*, 481 U.S. at 463 n.5 (describing the issue as "whether a railroad may[] ... challenge ... the appropriateness of the *accounting methods* by which the State determined the railroad's value, or is instead restricted to challenging the *factual determinations* to which the State's preferred accounting methods were applied.") One district court has differentiated "between formulas that are used in the various methods of appraising and the specific numbers, percentages, types of property and any other matter that the individual appraisers use to make the formula applicable to the specific appraisal in question." *Bair*, 815 F. Supp. at 1229 (rejecting the railroad's argument that state should have determined the company's unit value under a DCF rather than stock-and-debt and capitalized income approaches). In *Chesapeake Western*, the Fourth Circuit did not articulate a test but simply recognized the distinction between "methods" and "applications" and then found that the railroads' effort to convince the court "to reject Virginia's inventory and summation approach ... and dictate [the unit rule] to Virginia" was a dispute about "methods" that the court could not consider. *Chesapeake Western*, 938 F.2d at 532 n.4. Later, in *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 248-249 (4th Cir. 1993), the Fourth Circuit held that the railroad had sufficiently alleged that

the state misapplied its "across the fence" methodology by failing to make adjustments required under that method to account for differences in a property's size, shape, topography, accessibility and additional physical features.

The Solicitor General concedes that "when a State is making the initial determination whether to use the unit rule or the summation method to value railroad or other property, it may be fair to say that the choice is purely one of methodology." U.S. Brief, p. 21. Nor, for example, is there a plausible argument that the stock-and-debt method is just a different "application" of a DCF method. To be sure, there can be closer questions, including the one that the Eleventh Circuit addressed in this case but that CSXT did not appeal. But so far the courts have in practice been able to discern the appropriate line between different "methods" on the one hand and different "applications" of the same method on the other, even though the boundary may not always be perfectly distinct or easily described in the abstract. Petitioner suggests that, in order to avoid any possibility whatsoever of confusion at the margins, the railroads should always be permitted to subject a state's valuation methodology to a battle of expert witnesses over whether it is "better" than any other method a railroad might wish to use – whether the unit rule instead of a summation approach, *see Chesapeake Western*, 938 F.2d at 532 n.4, a DCF instead of a capitalized income method, *see Bair*, 815 F. Supp. at 1227, or any method (presumably) instead of the stock-and-debt approach that this Court approved many years ago. *See* Pet. Brief, p. 32 ("a stock-and-debt method cannot reliably estimate 'true market value.'"). That is a cure that is worse than the alleged disease, turning the district courts into federal boards of equalization, and extending Section 11501(b)(1) beyond its

evident scope, all at the expense of legitimate policy choices that states should be free to make in selecting methods to estimate the taxable value of property within their jurisdiction.

VI. CSXT Is In No Event Entitled To A New Trial

Finally, CSXT says that this case should be "remanded for a new trial." Pet. Brief, p. 50. CSXT does not, however, articulate any reason for that prayer for relief, and there is none. Although the district court concluded after trial that it could not consider the railroad's appraisal in finding CSXT's "true market value," the judge received that appraisal into evidence along with all of the testimony that CSXT offered in support thereof.[19] In fact, CSXT contends that it "argued and proved that its true market value was $6 billion." Pet. Brief, p. 16. The State disagrees with that claim, but it clearly illustrates that, regardless how this Court decides, a "new trial" is not needed.

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[19] The statement on page 2 of CSXT's brief that the Eleventh Circuit "upheld the exclusion of CSXT's expert testimony on the market value of its property" is incorrect.

CONCLUSION

For the reasons above, the Respondents respectfully ask that the decision by the Eleventh Circuit be affirmed.

Respectfully submitted,

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